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July 7, 2021

**SENT VIA ELECTRONIC MAIL**

Mr. Conor Eckert, Executive Director  
Town of Montgomery Industrial Development Agency  
110 Bracken Road  
Montgomery, New York 12549

RE: Walden Construction Enterprise LLC – Town of Montgomery IDA Application

Dear Conor:

In preparation for the July 13<sup>th</sup>, 2021 meeting of the Town of Montgomery Industrial Development Agency, this letter is submitted for the following purposes: (1) to further address concerns raised by the Agency with the eligibility of a rental housing project for IDA financial assistance in the form of tax exemptions, (2) to update the company's application and (3) to request that a public hearing on the company's application is set. Please add this letter and the exhibits that follow to the project documents posted to the Agency's website.

Ample evidence as to the eligibility of rental housing projects for IDA financial assistance exists. Most demonstrative is the enclosed list, provided as Exhibit A to this letter, of approximately ninety (90) rental housing projects, identified through a random search, approved for some combination of IDA financial assistance typically either (1) a combination of sales and use tax exemption and mortgage recording tax exemption or (2) a combination of real property tax exemption, sales and use tax exemption and mortgage recording tax exemption. The Town of Montgomery IDA may decide in its reasonable discretion to grant some combination of tax exemptions that the Agency deems appropriate in relation to the application of Walden Construction Enterprise LLC.

Time is of the essence to the project. To update the Agency and the company's application, Walden Construction Enterprise LLC as of the date of this letter holds title to the proposed project

site and decisions regarding construction are being delayed pending the Agency's proceedings. For financial reasons, such decisions cannot be delayed for an extensive period or indefinitely. Therefore, the Agency is respectfully requested to proceed on July 13<sup>th</sup>, 2021 with the company's application by setting a public hearing.

The Agency extended the opportunity to the NYS Authorities Budget Office ("ABO") to provide an opinion as to the eligibility of a rental housing project for IDA financial assistance and the ABO declined. The Agency's correspondence with the ABO is provided as Exhibit B. The NYS Office of the State Comptroller, as discussed below, issued a 1985 opinion that has set precedent over the last four decades and guided later court decisions. Furthermore, to now not recognize the eligibility of a rental housing project for financial assistance, the Town of Montgomery Industrial Development Agency would have to act contrary to its own uniform tax exemption policy.

New York State General Municipal Law Section 874(4)(a) requires that each industrial development agency adopt a uniform tax exemption policy (sometimes referred to herein as a "UTEP") which provides guidelines for the claiming of real property, mortgage recording, and sales tax exemptions. The UTEP is intended to protect against disparate treatment and arbitrary decision-making and to provide transparency. In accordance with Section 874(4)(a) of the NYS General Municipal Law, the uniform tax exemption policy should include the types of projects for which tax exemptions can be claimed amongst other guidelines.

Section 8(E) of the Uniform Tax Exemption Policy adopted by the Town of Montgomery Industrial Development Agency (the "Agency"), amended as recently as December of 2020, specifically recognizes senior housing projects as eligible for tax exemptions. This section of the policy lists those projects that qualify for certain tax exemptions and reads in pertinent part with emphasis added for clarity, "Eligible Projects include, but are not limited to media and communications, healthcare, insurance, recreation, professional office, workforce housing, senior housing, healthcare/assisted living, hotels/lodging, qualifying retail, and tourism facilities." The Town of Montgomery IDA policy evidences a finding by the Agency that senior housing projects qualify as commercial activity and thus, eligible projects within the meaning of Article 18-a.

Two court cases have upheld the eligibility of rental housing projects for financial assistance. In *Ryan, et al. v. Town of Hempstead Industrial Development Agency*, Index No. 5324/16 (*Sup. Ct. Nassau Co. Jan. 27, 2017*), the New York State Supreme Court, Nassau County upheld IDA financial assistance to a project involving the construction of a 336 unit apartment complex. The Court concluded that the residential project was a project within the meaning of General Municipal Law § 854(4), and in furtherance of the purpose of the industrial development agency to promote employment opportunities and prevent economic deterioration. In *Triple S. Realty v. Village of Port Chester*, Index No. 22355/86 (*Sup. Ct. Westchester Co. Aug. 19, 1987*), the New York State Supreme Court, Westchester County held that construction of an apartment complex may be eligible for tax exemptions if such construction would increase employment opportunities and prevent economic deterioration in the areas served by the IDA.

The Office of the State Comptroller, as aforementioned, in a 1985 opinion stated that "local officials must determine, based upon all the relevant facts, whether construction of an apartment

complex will promote employment opportunities and prevent economic deterioration.”<sup>1</sup> The Comptroller specifically declined to “render an opinion as to whether a project which consists of the construction of an apartment complex is a commercial activity within the meaning of Article 18-A.”<sup>2</sup> The Comptroller stated, “Such a determination must be made by local officials based upon all the facts relevant to the proposed project.”<sup>3</sup> The Comptroller’s opinion notes that such determination should consider the stated purposes of the New York State Industrial Development Act specifically the promotion of employment opportunities and the prevention of economic deterioration.

The Appellate Division, Fourth Department in the matter of *Nearpass v. Seneca County Industrial Development Agency*, 152 A.D.3d 1192 (N.Y. App. Div. 4th Dep’t 2017) issued a decision related to the interpretation of the term “commercial” within the definition of projects in Section 854(4) of the New York State General Municipal Law. The Court stated, “we conclude that the broad statutory terms ‘commercial’ and ‘recreation’ within the definition of ‘project’ in section 854(4) are ambiguous insofar as they are susceptible to conflicting interpretations. As such, SCIDA’s interpretation is entitled to great deference, and must be upheld as long as it is reasonable”. The Court’s decision further states, “SCIDA’s determination was not affected by an error of law inasmuch as its interpretation of section 854(4) is not irrational or unreasonable”.

The provision recognizing senior housing projects as commercial projects eligible for tax exemptions within Section 8(E) the Town of Montgomery Industrial Development Agency Uniform Tax Exemption Policy, likewise, is subject to a reasonableness test and is well supported by the existing case law and administrative guidance provided over the last four decades. The Agency’s UTEP is consistent with the policies and practices of Industrial Development Agencies across New York State that recognize rental housing projects as eligible for tax exemptions. The sample list of such projects, mentioned above, follows. This list represents only a sample of rental housing projects that have been approved for IDA tax exemptions according to a brief survey of randomly selected Industrial Development Agency websites.

The senior rental housing project proposed by Walden Construction Enterprise LLC to the Town of Montgomery Industrial Development Agency involves the construction of 69 units for senior living (age 55+) in the Village of Walden, New York to be located at 120 and 126 North Montgomery Street with amenities including (1) a pedestrian connection to downtown, (2) onsite walking paths, trails or gardens, (3) a library, (4) an exercise room, (5) twenty-four security, (6) elevator service, (7) a caretaker’s dwelling, (8) a management office, (9) a game room or recreation room, and (10) a community room or social hall. The proposed project facility addresses common concerns of seniors with isolation, security, readily accessible assistance, property maintenance, proximity to downtown, and outdoor and indoor leisure space.

The project is expected to create 170 construction jobs over the anticipated 2-year construction period. The construction jobs would be offered in accordance with the IDA’s Local Labor Policy if financial assistance is granted. Within the first year following completion of construction, the project will create at least 7 ongoing positions (4 of which will be employed

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<sup>1</sup> Ops. St. Com., No. 85-51 (Aug. 16, 1985).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

positions and 3 independent contractor positions). The total project cost and investment in the community is estimated to be \$14,788,000, \$900,000 of which is represented by annual debt service.

According to the Summary of Findings dated May 2021 by Cynthia Falk, Ph.D., the Village of Walden Comprehensive Plan, updated in 2019, recognizes the need for senior housing and other amenities geared toward people age 50 or older. Using 2016 American Communities Survey data, the plan argues: “Walden’s population by age group is comparable to that of Orange County. Roughly 28% of the Village’s population is 50 years of age or older. As this population ages, services to meet the needs of its senior population will grow.” American Community Survey data from 2019 shows that in the Village of Walden roughly 25% of the population is age 50 or above, but only 8% of the population is age 65 or above whereas in the Poughkeepsie, Newburgh-Middletown NY Metro Area as a whole, more than 15% of the population is age 65 or older. These statistics indicate that the goal set by the Village of Walden in its Comprehensive Plan has not yet been met. Seniors are leaving the Village at a substantially higher rate than other nearby communities.<sup>4</sup>

The housing vacancy rate in the Village of Walden is one half of the vacancy rate in the state as a whole. More importantly, the types of housing located within the Village of Walden are limited. The vast majority of housing units, 72 percent, are single units. As a result of the type of housing availability, the cost of housing is escalated and the opportunity for housing mobility is diminished. The Walden Comprehensive Plan in combination with the Village’s vacancy rate suggests that the lack of senior housing and other amenities prompt seniors to move out of the Village. The availability of senior housing within Walden would create reasonable accessibility for those who would like to remain in the Village but transition away from ownership of large single-family houses.<sup>5</sup>

The proposed project would offer two bedroom units at the initial market rental rate of \$1,700 per month; this monthly rental rate is comparable to the few other senior housing developments that exist in the surrounding area and are known to be occupied at full capacity. The rental rates for the units will adjust with the market. At current market rates, the project is unlikely to realize a return on investment within the first seven years of development.<sup>6</sup> Consequently, it is critical for the IDA to provide incentives through reduced taxes that will allow the project to move forward.

According to Dr. Falk, “without tax exemptions the developers would not be able to make the rental units reasonably accessible to the residents of the Village of Walden, and without the project, Walden will continue to lack in senior housing.” Thus, the project not only statutorily qualifies for tax exemptions as “commercial” activity that creates jobs and prevents economic deterioration, but also meets the heightened “but for” legal standard enunciated in Section 862(2)(b) of the NYS General Municipal Law for a “retail” project. Without or “but for” the

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<sup>4</sup> See Summary of Findings dated May 2021 by Cynthia Falk, Ph.D. included with the application of Walden Construction Enterprise LLC to the Town of Montgomery Industrial Development Agency.

<sup>5</sup> *Id.*

<sup>6</sup> See Application of Walden Construction Enterprise LLC to Town of Montgomery Industrial Development Agency page 32.

proposed project, senior housing will not be reasonably accessible to residents of the Village of Walden, and the project as currently structured is only economically viable with Industrial Development Agency financial assistance in the form of tax exemptions.

For all of the foregoing reasons, we respectfully request that the Town of Montgomery Industrial Development Agency proceed with setting a public hearing on the company's application and following the public hearing consider some combination of tax exemptions. We appreciate the Agency's consideration of this request.

Sincerely,

*Michelle L. Kennedy*

Michelle L. Kennedy

cc: Walden Construction Enterprise LLC  
Richard Golden, Esq., IDA Counsel  
Ashley Torre, Esq., IDA Counsel

## **EXHIBIT A**

**BURKE, MIELE, GOLDEN & NAUGHTON, LLP**

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GOSHEN, NEW YORK 10924  
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RICHARD B. GOLDEN  
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June 10, 2021

**Via Email [Jeff.Pearlman@abo.ny.gov](mailto:Jeff.Pearlman@abo.ny.gov), [info@abo.state.ny.us](mailto:info@abo.state.ny.us) and First Class Mail**

Jeffrey H. Pearlman, Director  
State of New York  
Authorities Budget Office  
P.O. Box 2076  
Albany, New York 12220-0076

Re: Town of Montgomery Industrial Development Agency

Director Pearlman:

This office represents the Town of Montgomery Industrial Development Agency ("TMIDA"). I write on behalf of the IDA to request an opinion or guidance from the State of New York Authorities Budget Office ("ABO") regarding the eligibility of a proposed project that has applied for financial assistance from TMIDA.

The applicant, Walden Construction Enterprise LLC ("Applicant"), is seeking sales tax, real property tax, and mortgage recording tax exemptions for a proposed 68-unit senior (55+) housing rental apartment building in the Village of Walden, in the Town of Montgomery. As I am sure you are aware, relevant State law does not explicitly recognize such residential projects as eligible for IDA benefits. Because the law is not clear on a residential development's eligibility for financial assistance from an industrial development agency, I suggested to TMIDA's Board of Directors that it may be wise to seek an opinion or guidance from the ABO on this matter, as the regulatory office that oversees the IDA's operations. They requested that I write this letter.

We are aware that other industrial development agencies in the State have approved projects involving residential construction, in whole or in part, characterizing each as a "commercial" project. There is little caselaw on this issue, but we understand an industrial development agency's award of financial assistance to a residential development as a commercial project has been upheld in two State Supreme Court decisions. *See Triple S. Realty v. Village of Port Chester*, Index No. 22355/86 (Sup. Ct. Westchester Co. Aug. 19, 1987); *Matter of Ryan v. Town of Hempstead Industrial Development Agency*, Index No. 5324/16 (Sup.Ct. Nassau Co. Jan.

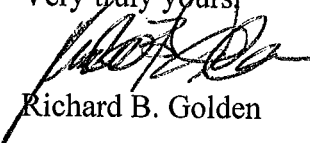
27, 2017). There is also an opinion from the State Comptroller's Office that is often cited in support of an industrial development agency's consideration of residential construction as a commercial project, even though it specifically declined to issue an opinion directly addressing the issue. *See* 1985 Ops. St. Comp. No. 85-51, 1985 WL 25843.

TMIDA respectfully requests that the ABO provide an opinion or guidance to TMIDA as to whether the Applicant's proposed senior housing development constitutes, in the opinion of the ABO, a project eligible for financial assistance from TMIDA, as a "commercial" project or otherwise. The subject application to TMIDA and supporting papers, including a memorandum from the Applicant's legal counsel as to its eligibility for IDA financial assistance as a commercial project, are available on TMIDA's website at <https://montgomeryida.com/projects/walden-construction-enterprise-llc/> (last accessed June 8, 2021).

As the Applicant is eager to proceed, and TMIDA eager to address this issue directly and in a timely manner, we ask that the ABO render this opinion or guidance at its earliest opportunity. If, upon receipt of this letter the ABO would provide an estimated time frame for when such an opinion or guidance may be expected, it would be greatly appreciated.

Thank you for your time and attention to this matter. Should you have any questions please do not hesitate to contact me.

Very truly yours,



Richard B. Golden

cc: Town of Montgomery Industrial Development Agency (*via email*)  
Conor Eckert, Executive Director (*via email*)  
Michelle Kennedy, Esq. (*via email*)



## McGrath, Susan

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**From:** Richard Golden <rgolden@bmglawyers.com>  
**Sent:** Friday, June 11, 2021 3:15 PM  
**To:** abo.sm.info  
**Cc:** executivedirector@montgomeryida.com; Kennedy, Michelle; Ashley Torre; Pearlman, Jeff (ABO); Lisa Alvarado  
**Subject:** Re: Town of Montgomery Industrial Development Agency

**CAUTION: This email originated from outside of the firm. Do not click links or open attachments unless you recognize the sender and are expecting the message.**

I believe you misunderstood the inquiry of Town of Montgomery IDA. We were not asking for a “formal legal opinion.” The ABO is a State oversight agency of the IDA and the IDA was asking for an opinion or guidance on a fundamental eligibility issue. If you are not willing to provide proactive guidance on such issues, it only follows that you would not issue any opinion as to the propriety of whatever action the IDA takes in this regard. As you suggest, we will attempt to get an opinion/guidance from the Comptroller and Attorney General’s Offices. However, as we advised you, the Comptroller has already indicated it was not willing to give an opinion on this issue, so your suggestion in this regard is a little surprising. Thank you for your consideration.

Richard B. Golden, Esq.  
Burke, Miele, Golden & Naughton, LLP  
P.O. Box 216  
40 Matthews St., Suite 209  
Goshen, New York 10924  
845-294-4080 (Office)  
845-551-0895 (Cell)

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**From:** abo.sm.info  
**Date:** Friday, June 11, 2021 at 8:37 AM  
**To:** Richard Golden  
**Cc:** executivedirector@montgomeryida.com , MKennedy@woh.com , Ashley Torre , Pearlman, Jeff (ABO) , Lisa Alvarado  
**Subject:** RE: Town of Montgomery Industrial Development Agency

Dear Richard Golden,  
The ABO is not authorized to issue formal legal opinions, and this response is not intended to serve as a formal legal opinion. We suggest you contact the NYS Office of the Comptroller and the NYS Attorney General’s Office, as both offices have the statutory authorization to provide you with a legal opinion on this topic.  
Thank you.  
NYS Authorities Budget Office  
[www.abo.ny.gov](http://www.abo.ny.gov)

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**From:** Lisa Alvarado  
**Sent:** Thursday, June 10, 2021 12:44 PM  
**To:** Pearlman, Jeff (ABO) ; abo.sm.info

**Cc:** executivedirector@montgomeryida.com; MKennedy@woh.com; Richard Golden ; Ashley Torre

**Subject:** Town of Montgomery Industrial Development Agency

*ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.*

Good afternoon. Attached please find Richard B. Golden, Esq.'s correspondence on behalf of the Town of Montgomery Industrial Development Agency.

Thank you.

Lisa Alvarado  
Paralegal  
Burke, Miele, Golden & Naughton, LLP  
40 Matthews Street, Suite 209  
P.O. Box 216  
Goshen, New York 10924  
P: (845) 294-4080  
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## **EXHIBIT B**

**Sample List of Industrial Development Agency Approved Projects that Include Rental Housing**

<b>Project Name</b>	<b>Location By County</b>	<b>Year Approved</b>	<b>Industrial Development Agency</b>
413 North Pearl Associates LLC	Albany County	2021	City of Albany IDA
Clinton Avenue Apartments II	Albany County	2021	City of Albany IDA
Lofts at Pine Hills	Albany County	2021	City of Albany IDA
1211 Western Avenueue Property Associates, LLC	Albany County	2020	City of Albany IDA
745 Broadway Apartments LLC	Albany County	2020	City of Albany IDA
New Scotland Village	Albany County	2020	City of Albany IDA
Kingstonian Development LLC	Ulster County	2020	Ulster County IDA
23-28 Creek Drive, LLC 2020	Dutchess County	2020	Dutchess County IDA
Kirby Commons	Westchester County	2020	Westchester County IDA
Violet Estates Owner LLC/Violet Estates LLC 2020	Dutchess County	2020	Dutchess County IDA
39 Columbia Street Assoc. LLC	Albany County	2019	City of Albany IDA
427 Washington Avenue	Albany County	2019	City of Albany IDA
76 North Pearl	Albany County	2019	City of Albany IDA
Harmony Mills South	Albany County	2019	City of Albany IDA
The Kenmore	Albany County	2019	City of Albany IDA
The Kennedy Apartments	Albany County	2019	City of Albany IDA
The Knick	Albany County	2019	City of Albany IDA
The Reserve at Park South II	Albany County	2019	City of Albany IDA
363 Ontario Street	Albany County	2018	City of Albany IDA
4 Central Avenue	Albany County	2018	City of Albany IDA
420 Broadway	Albany County	2018	City of Albany IDA
Landmark Albany	Albany County	2018	City of Albany IDA
Morris Place	Albany County	2018	City of Albany IDA
The Swinburne Building	Albany County	2018	City of Albany IDA
Landmark Preservation, L.P.	Ulster County	2018	Ulster County IDA
701 River Street	Rensselaer County	2018	City of Troy IDA
Summit at Mill Hill LLC Project	Albany County	2018	Town of Guilderland IDA
363 Ontario St LLC	Albany County	2018	City of Albany IDA
Eastdale Village 2018	Dutchess County	2018	Dutchess County IDA
At Hudson Park	Albany County	2017	City of Albany IDA
Auden Albany	Albany County	2017	City of Albany IDA
Capital District Apartments	Albany County	2017	City of Albany IDA
Home Leasing	Albany County	2017	City of Albany IDA
The Reserve at Park South	Albany County	2017	City of Albany IDA
10 River Street, LLC	Rensselaer County	2017	City of Troy IDA
444 River Lofts	Rensselaer County	2017	City of Troy IDA
Chestnut Bur, LLC	Rensselaer County	2017	City of Troy IDA
Albany Place Development LLC	Albany County	2017	Town of Guilderland IDA
760 Broadway	Albany County	2016	City of Albany IDA
960 Broadway	Albany County	2016	City of Albany IDA
99 Pine Street	Albany County	2016	City of Albany IDA
Nipper Apartments	Albany County	2016	City of Albany IDA
The Valley Green	Rensselaer County	2016	City of Troy IDA
School One Lofts	Rensselaer County	2016	City of Troy IDA
Mill Hollow Two LLC	Albany County	2016	Town of Guilderland IDA
599 River Street - Tapestry on the Hudson	Rensselaer County	2016	City of Troy IDA
1475 Washington Avenue Associates	Albany County	2015	City of Albany IDA
40-48 Pearl Street LLC	Albany County	2015	City of Albany IDA
Block75 Apartments	Albany County	2015	City of Albany IDA
One Columbia Place Realty LLC	Albany County	2015	City of Albany IDA
140 State Street Properties LLC	Albany County	2014	City of Albany IDA
40 Steuben LLC	Albany County	2014	City of Albany IDA
Eleftheria of Albany	Albany County	2014	City of Albany IDA
Lofts at 733 Broadway	Albany County	2014	City of Albany IDA
Park South Partners LLC	Albany County	2014	City of Albany IDA
33 Second Street	Rensselaer County	2014	City of Troy IDA
Livingston School Apartments	Albany County	2013	City of Albany IDA
Parkview Apartments	Albany County	2013	City of Albany IDA
The Arcade Building	Albany County	2013	City of Albany IDA
The Argus Apartments	Albany County	2013	City of Albany IDA
Pine Hills Senior Apartments	Albany County	2012	City of Albany IDA
Sheridan Hollow Village	Albany County	2012	City of Albany IDA
City Station East	Rensselaer County	2012	City of Troy IDA
City Station South	Rensselaer County	2012	City of Troy IDA
Penta on Broadway	Albany County	2011	City of Albany IDA
Sixty State Place	Albany County	2011	City of Albany IDA
The Gateway Apartments	Albany County	2011	City of Albany IDA
The Monroe Apartments	Albany County	2011	City of Albany IDA
City Station West	Rensselaer County	2011	City of Troy IDA
Morris Street Apartments	Albany County	2010	City of Albany IDA
Madison Properties of Albany	Albany County	2009	City of Albany IDA
Ardsley Housing Associates, LLC Facility	Westchester County	2002	Westchester County IDA